evidence before us clearly shows that it was lack of water in the boiler which largely contributed to the build up of the porous layer of magnetite. The fact shows that since the introduction of more feed water into the boiler, the coil has continued to function without any mishap. We, therefore, find that the dominant cause of the accident is not corrosion or corrosion fatigue but the lack of feed water in the boiler. We also find that the respondent did not intentionally or deliberately feed insufficient water into the boiler as they had followed the manufacture's instruction manual to the letter.

We, therefore, dismiss this appeal with costs.

DATUK LIM KHENG KIM

v.

MALAYAN BANKING BHD.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK GUNN CHIT TUAN CJ (MALAYA), DATO' PEH SWEE CHIN SCJ, DATO' MOHAMED DZAIDDIN BIN HJ ABDULLAH SCJ
[CIVIL APPEAL NO. 02-51 OF 1992]
4 JUNE 1993

BANKRUPTCY: Application to set aside bankruptcy notice - Whether affidavit filed under Rule 95 of Bankruptcy Rules 1969 complies with the provisions of Form 7 and the requirements of s. 3(1)(i) of the Bankruptcy Act 1967 - Affidavit filed in opposition to creditors petition - Whether effective and good in law.

The appellant, after having been served with a bankruptcy notice, filed an affidavit (Enclosure 3) to set aside the bankruptcy notice under Rule 95 of the Bankruptcy Rules 1969 (the Rules). The trial Judge held that the appellant had not shown sufficient cause why the receiving and adjudication orders should not be made and accordingly made orders in terms of the respondent's application.

On appeal, the question that arose was whether the affidavit filed by the appellant, which failed to follow both in form and substance Form No. 7 of the Rules, could be treated as an application to set aside the bankruptcy notice under Rule 95 of the Rules.

The appellant also filed an affidavit in opposition (Enclosure 15) to the creditors petition filed and served by the respondent. The question that arose for determination was whether this affidavit, which did not comply with the provisions of Rule 117 of the Rules which provides that where a debtor intends to show cause against a petition, he shall file a notice specifying the statements in the petition which he intends to deny or dispute, was ineffective and bad in law.

Held:

[1] Enclosure 3 merely denied and disputed that the appellant was indebted to the respondent for the sum stated in the bankruptcy notice but failed to disclose that he had a counterclaim, set-off or cross demand against the respondent which he is required to depose under s. 3(1)(i) of the

Bankruptcy Act 1967 and as provided for in Form 7 of the Rules. The said affidavit could not operate as an application to set aside the bankruptcy notice within the contemplation of s. 3(1)(i) of the Act, and the case should have been treated as if no affidavit under Rule 95 of the Rules had in fact been filed.

[2] Enclosure 15 contained every conceivable grounds of opposition the appellant could think of, which not only included the grounds raised in Enclosure 3, but also submissions of law and pleas for the Court to exercise its discretion judicially and in the interest of justice. Bearing in mind that Enclosure 15 did not make reference to a counterclaim, set-off or cross demand the appellant should have made a formal application by motion supported by this affidavit in compliance with Rule 18 of the Rules.

[3] The failure on the part of the appellant to follow Rule 18 of the Rules rendered Enclosure 15 ineffective and bad in law because unless the Court otherwise directs, challenges to the creditor's petition or bankruptcy notice, other than that he has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit.

[Appeal dismissed with costs].

[Bahasa Malaysia Translation of Headnote**]**

KEBANKRAPAN: Permohonan untuk mengenepikan notis kebankrapan - Sama ada afidavit yang difailkan di bawah Kaedah 95, Kaedah-kaedah kebankrapan 1969 mematuhi syarat-syarat Borang 7 dan keperluan-keperluan s. 3(1)(i) Akta Kebankrapan 1967 - Afidavit difailkan menentang petisyen pemiutang - Sama ada berkesan dan baik di sisi undang-undang.

Perayu, setelah disampaikan dengan notis kebankrapan, memfailkan suatu afidavit (Lampiran 3) untuk mengenepikan notis kebankrapan di bawah Kaedah 95, Kaedah-kaedah Kebankrapan 1969 (Kaedah-kaedah tersebut). Hakim perbicaraan memutuskan bahawa perayu tidak menunjukkan sebab-sebab yang mencukupi mengapa perintah penerimaan dan perintah penghukuman tidak harus dibuat dan berikutan dengan itu membuat perintah sebagaimana yang dipohon dalam permohonan responden.

Atas rayuan, persoalan yang timbul ialah sama ada afidavit yang difailkan oleh perayu, yang gagal mengikut bentuk dan kandungan Borang 7 dalam Kaedah-kaedah tersebut, dapat disifatkan sebagai suatu permohonan untuk mengenepikan notis kabankrapan di bawah Kaedah 95, Kaedah-kaedah tersebut.

Perayu juga memfailkan satu afidavit penentangan (Lampiran 15) kepada petisyen pemiutang yang difailkan dan disampaikan oleh responden. Persoalan yang berbangkit untuk diputuskan ialah sama ada afidavit ini yang tidak mematuhi syarat-syarat di bawah Kaedah 117, Kaedah-kaedah tersebut yang mensyaratkan bahawa apabila penghutang berniat untuk menunjukkan sebab terhadap sesuatu petisyen, dia hendaklah memfailkan satu notis mengkhususkan pernyataan-pernyataan dalam petisyen itu yang hendak dinafikan atau dipertikaikannya, adalah tidak berkesan dan tidak baik dari segi undang-undang.

Diputuskan:

[1] Kandungan 3 hanya menafikan dan mempertikaikan bahawa perayu adalah berhutang kepada responden akan wang yang jumlahnya dinyatakan dalam notis kebankrapan tetapi gagal untuk menyebutkan bahawa dia mempunyai tuntutan balas, tolakan atau tuntutan silang terhadap responden yang perlu dia sebutkan di bawah s. 3(1)(i), Akta Kebankrapan 1967 dan sebagaiman yang disyaratkan dalam Borang 7, Kaedah-kaedah tersebut. Afidavit tersebut tidak dapat berfungsi sebagai satu permohonan untuk mengenepikan notis kebankrapan dalam lingkungan maksud s. 3(1)(i) Akta tersebut, dan kes tersebut sepatutnya disifatkan sebagai seolah-olah tiada afidavit difailkan di bawah 95, Kaedah-kaedah tersebut.

[2] Lampiran 15 mengandungi setiap alasan penentangan yang boleh dibuat yang dapat difikirkan oleh perayu, yang bukan sahaja termasuk alasan yang dibangkitkan dalam Lampiran 3, tetapi juga penghujahan undang-undang dan pli untuk Mahkamah menggunakan budibicaranya secara kehakiman dan demi kepentingan keadilan. Dengan mengambil ingatan bahawa Lampiran 15 tidak merujuk kepada tuntutan balas, tolakan atau tuntutan silang, perayu sepatutnya membuat satu permohonan yang formal melalui usul yang disokong dengan afidavit ini dalam mematuhi kaedah 18, kaedah-kaedah tersebut.

[3] Akibat kegagalan dipihak perayu untuk mengikuti Kaedah 18, Kaedah-kaedah tersebut, Lampiran 15 telah disifatkan sebagai tidak berkesan dan tidak baik dari segi undang-undang kerana melainkan Mahkamah memutuskan sebaliknya, penentangan kepada petisyen pemiutang atau notis kebankrapan, selain daripada tuntutan balas, tolakan atau tuntutan silang yang menyamai ataupun melebihi hutang penghakiman, haruslah dibuat dengan memfailkan notis usul yang disokong dengan satu afdavit.

[Rayuan ditolak dengan kos].

Cases referred to:
In re A Debtor, ex parte Debtor [1934] 1 Ch 347 CA ***(foll)***
Re Natarajan a/l Kuppusamy [1992] 3 CLJ 1638/ [1992] 2 MLJ 468 ***(refd)***
Soh Bok Yew v. Cindee Development Sdn. Bhd. [1977] 1 MLJ 242 ***(refd)***
Re A Debtor (No. 10 of 1953) [1953] 1 WLR 1050 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(1)(i)
Bankruptcy Rules 1969, rr. 18, 95(1), (2), 117
Bankruptcy Rules 1915, rr. 140, 141 (UK)

For the appellant - Ooi Teck Hoe (Choo Hon Choy with him); M/s. Ooi Lee & Co.
For the respondent - Toh Lee Hong (Tho Su-Fen with her); M/s. Lim Huck Aik & Co.

JUDGMENT

Mohamed Dzaiddin bin Hj Abdullah SCJ: This was an appeal from the decision of Abdul Hamid JC (as he then was) granting the receiving and adjudication orders against the appellant on 27 January 1992. We dismissed the appeal and now give our reasons for the decision.

The facts of the case had been clearly set out in the judgment of the learned Judicial Commissioner reported in [1992] 3 CLJ 1449/ [1992] 2 MLJ 540. However, for the purpose of the appeal, we would like to state briefly the salient facts. On 27 April 1989, Malayan Banking Bhd. (the respondent) issued a bankruptcy notice against the appellant requiring him to pay the sum of RM2,603,913.28, being the amount due on a final judgment including interests, professional charges and costs. The notice was served on the appellant on 2 May 1989. On 6 May 1989, he filed an affidavit (enclosure 3) purportedly to be an affidavit to set aside bankruptcy notice under Rule 95 of the Bankruptcy Rules 1969 (the Rules). About 5 $^{1}/_{2}$ months later, that is, on 2 October 1989, the respondent filed the creditor's petition against the appellant, which was served on him on 29 November 1989 and one month thereafter, on 29 December 1989, the appellant filed another affidavit, described as an "Affidavit in Opposition" (enclosure 15). This was a lengthy affidavit which contained several grounds, including the two grounds which he had deposed in the earlier affidavit (enclosure 3).

After hearing the creditor's petition and the submissions of Counsel on 27 January 1992, the learned Judicial Commissioner was satisfied that the appellant had not shown sufficient cause why the receiving and adjudication orders should not be made. Accordingly, he made the orders in terms.

Before us, Encik Ooi Teik Hoe, Counsel for the appellant, raised several grounds of appeal contending that the learned Judicial Commissioner was wrong in law on his decision. In dismissing the appeal, we hasten to state that we have no reason to disagree with the decision of the learned Judicial Commissioner. However, we would like to elaborate on the effect of the two affidavits (enclosures 3 and 15) vis-a-vis the bankruptcy petition.

In dealing with the two affidavits in enclosures 3 and 15, the learned Judicial Commissioner made the following observations:

> Enclosure 3 is an affidavit in which the judgment debtor disputed that he was indebted to the judgment creditor in the sum of RM2,603,913.28 stated in the bankruptcy notice. Enclosure 3 itself gives no particulars. But particulars are given in the 'affidavit in opposition' - encl 15. (p. 549).
>
> Enclosure 15 is an 'affidavit in opposition' and filed one month after the creditor's petition was served on the judgment debtor. By right it should be a notice to show cause pursuant to r. 117. But it also contains attacks on the bankruptcy notice, including grounds raised in encl 3, besides new grounds. It also contains grounds as to why the creditors's petition should be dismissed. (p. 551).

Enclosure 3

This affidavit was filed on 6 May 1989 which reads as follows:

1. I am the Judgment Debtor abovenamed and the facts deposed to hereto are within my personal knowledge in all respects true unless the contrary is shown.
2. I have read and caused to be explained to me the bankruptcy Notice dated 27 April 1989.
3. I deny and further dispute that I am indebted to the judgment creditors in the sum of RM2,603,913.28 as stated therein. In this respect, I state that the figure was based on an erroneous calculation and grossly exaggerated.
4. In the premises, I am accordingly advised by my solicitors and verily believe that the Bankruptcy Notice is bad ab initio and I am therefore not obliged to comply with same. My solicitors will submit on points of law at the hearing.

We would observe here that the above affidavit, purportedly an affidavit to set aside bankruptcy notice, fails to follow, both in form and substance, Form No. 7 of the Rules, which contains the requirements of s. 3(1)(i) pertaining to a debtor to "satisfy the court that he has a counter-claim, set-off or cross demand which equals or exceeds the amount of the judgment debt and which he could not set up in the action in which the judgment was obtained ..."

Rule 95 of the Rules states as follows:

> 95. Application to set aside.
>
> (1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.
>
> (2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

It seems clear to us that by r. 95(1), the filing of the affidavit as in enclosure 3 operates as an application to set aside the bankruptcy notice, and the registrar is required to fix a day for the hearing of the application, and by sub-rule (2), if the application cannot be heard before the time specified in the bankruptcy notice for compliance with its requirement, the Registrar shall extend the time.

In re A Debtor, ex parte Debtor [1934] 1 Ch. 347 CA Lord Hanworth MR, delivering the judgment of the Court, dealt with r. 141 of the Bankruptcy Rules 1915 (which is *in materia* with our r. 95) and stated at p. 349:

> The filing of an affidavit for the purpose of an application to set aside a bankruptcy notice, if the affidavit is one which complies with r. 140 of the Bankruptcy Rules 1915, is to be treated as notice of an application to set aside the notice, and then the procedure under r. 141 follows. That rule is mandatory and clear. It says this: "The filing of such affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for the hearing of the application, and not less than three days before the day so fixed shall give notice thereof both to the debtor and the creditor, and their respective solicitors, if known. If the application cannot be heard until after the expiration of the time specified in the notice as the day on which the act of bankruptcy will be complete, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

It is noted here that r. 140 dealt with the affidavit which must contain "a counterclaim, set-off or cross demand" and one which the deponent could not have set up in the action in which the judgment or order was obtained. Slesser LJ, in his judgment (p. 352) emphasised:

> It is, therefore, necessary that the affidavit in question should, on the face of it, show a counterclaim, set-off, or cross demand which equals or exceeds the amount of the Judgment debt, and which the debtor could not have set up in the action in which the judgment or order was obtained.

We are concerned here with the content of the said affidavit. It merely denies and disputes that the appellant was indebted to the respondent in the sum of RM2,603,913.28, but fails to disclose that he has a counterclaim, set-off or cross demand etc. against the respondent, which he is required to depose under s. 3(1)(i) of the Act and provided for in Form 7. Following the above decision and in the face of the above affidavit, we

are of the opinion that the said affidavit cannot operate as an application to set aside the bankruptcy notice within the contemplation of s. 3(1)(i) of the Act, and the case should have been treated as if no affidavit under r. 95 had in fact been filed. Similarly, as para 3 of the enclosure merely disputes his indebtedness in the said sum to the respondent "based on an erroneous calculation and grossly exaggerated" without condescending to particulars of the amount actually due, we say that the said affidavit does not attract proviso 2(ii) of s. 3 which states that a bankruptcy notice shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the actual amount due.

Further, under sub-rule (2) of r. 95, if the application cannot be heard before the time specified in the notice for compliance with the requirements of the bankruptcy notice, the Registrar shall extend the time for the hearing. Thus, what happened in this case was that when the hearing of enclosure 3 was fixed on 30 August 1989, the Judge hearing the bankruptcy petitions on that day overlooked this application but proceeded to dispose of enclosure 6, which was a notice of motion for an order that further proceedings be stayed until the payment of costs by the respondent to the appellant in respect of an earlier proceeding. From the record, no fresh date of hearing in respect of enclosure 3 was given by the Court, and nor was there any evidence that the Registrar had granted an extension of time for the hearing of the application. Encik Ooi submitted that failure of the Registrar to extend the time did not invalidate the appellant's application in enclosure 3. Counsel relied on the judgment of V.C. George J. in *Re Natarajan a/l Kuppusamy* [1992] 2 MLJ 468, who held that in the face of the language in r. 95(2), the time for the compliance with the bankruptcy notice was to be deemed to have been extended by the Registrar until the application had been disposed. The learned Judge followed the judgment of the Federal Court in *Soh Bok Yew v. Cindee Development Sdn. Bhd.* [1977] 1 MLJ 242, where, in its judgment, it referred to a judgment of Harman J in *Re A Debtor (No. 10 of 1953)* [1953] 1 WLR 1050 at p. 1054 which states:

> The rule is directory and compels the registrar to extend it until the application has been heard and determined.

One of the points argued in *Soh Bok Yew* was whether the various adjournments made by the Judge had complied with the requirements under r. 95(2) that the registrar should extend the time for compliance under the notice. The Federal Court, relying on Harman J's dictum, held that

> the fact that the various adjournments on record were made in Open Court by the learned trial Judge does not make any difference because the registrar has no choice and may be deemed to have made corresponding extensions of time for compliance with the notice. (p. 243).

The learned Judge further stated that based on his own enquiries from the current practice in our Courts, the registrars generally did not expressly extend the time which they were required to do by r. 95(2).

For reasons stated by George J, with which we agree, we say that r. 95(2) is merely directory which compels the registrar to extend the time until the application opposing the bankruptcy notice is heard and determined.

Enclosure 15

This is the appellant's affidavit affirmed on 29 December 1989, which he called an "Affidavit in Opposition". It contains nineteen paragraphs attacking the bankruptcy notice and raising several grounds why the creditor's petition should be dismissed.

Rule 117 provides that where a debtor intends to show cause against a petition, he shall file a notice specifying the statements in the petition which he intends to deny or dispute. The format of the notice of intention to oppose the petition is given in Form 16 of the Rules, which simply provides that:

> I, the above ... do hereby give you notice that I intend to oppose the making of a receiving order as prayed and that I intend to dispute the petitioning creditor's debt (or the act of bankruptcy, or as the case may be).

Looking at the appellant's "Affidavit in Opposition", it appears that he had jumbled up every conceivable grounds of opposition he could think of in this affidavit, which not only includes grounds raised in enclosure 3, but also submissions of law and pleas for the Court to exercise its discretion judicially and in the interest of

justice. Bearing in mind that this "Affidavit in Opposition" was filed one month after the creditor's petition was served on him and contained multitude of grounds other than the existence of a counterclaim or set-off or cross demand, he should have made a formal application by motion supported by this affidavit in compliance with r. 18, which reads:

> Applications to be made by motion.
>
> Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Court otherwise directs, be made by motion supported by affidavit.

In our opinion, failure on the part of the appellant to follow r. 18 renders his "Affidavit in Opposition" ineffective and bad in law because unless the Court otherwise directs, challenges to the creditor's petition or bankruptcy notice other, than that he has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. Unfortunately, he has failed to do so in this case.

In passing, we wish to emphasise that, contrary to what had been expressed in *Soh Bok Yew (supra)*, if a bankruptcy petition is to be founded on an act of bankruptcy based on a failure to comply with a bankruptcy notice, it is self-evident that such a petition can only be filed after the application to set aside the bankruptcy notice is heard and dismissed.

For the above reasons, we dismissed the appeal with costs.

FIRST MALAYSIA FINANCE BERHAD

v.

DATO' MOHD FATHI BIN HAJI AHMAD

SUPREME COURT, KUALA LUMPUR
DATUK HJ. MOHD JEMURI BIN SERJAN CJ (BORNEO), TAN SRI DATO' EDGAR JOSEPH JR., DATUK MOHAMED DZAIDDIN BIN HJ. ABDULLAH SCJJ.
[CIVIL APPEAL NO. 02-62-91]
9 JUNE 1993

PRACTICE & PROCEDURE: Application to strike out action against fifth defendant- Order 18 rule 19 Rules of the High Court 1980 - Plaintiff's action against fifth defendant for discovery - Whether discovery can amount to a cause of action - Whether plaintiff's claim against fifth defendant disclosed reasonable cause of action - Whether statement of claim frivolous, vexatious or an abuse of the process of the Court.

The plaintiff, the beneficial owner of shares in the fifth defendant, had by several sales and purchase agreements contracted with the first, second, third and fourth defendants to sell the shares to them. The plaintiff sued the first to the fourth defendants for the purchase price and their defence was that in accordance with the mode of payment stipulated in the agreements, the purchase price had been paid to the account of several companies under the control of the plaintiff which had obtained loans from the fifth defendant.

The plaintiff's claim against the fifth defendant was for information relating to the alleged payment by the first to the fourth defendants and for discovery of the relevant accounts. The trial Court Judge found that the plaintiff had brought himself within the ambit of the exception of the the principle in *Norwich Pharmacal Co. v. Customs and Excise Commissioners* and held that in the special circumstances of the case an action for discovery alone could exist and dismissed the fifth defendants' application to strike out the action. The fifth defendant appealed.

Held:

[1] Unlike the *Norwich Pharmacal* case , the present case was one where the identity of those who where alleged by the plaintiff to have committed the wrongful acts *vis-a-vis* the plaintiff were known to the plaintiff and,